

1988

Performance Investment v. Leo F. Folsom : Brief of Appellant

Utah Court of Appeals

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BRIEF

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

88-0230

PERFORMANCE INVESTMENT :
CORPORATION, RODNEY JENSEN, ET AL,

Plaintiff and Appellant.

-vs-

LEO F. FOLSOM, ET AL,

Defendant and Respondent.

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:
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: Court of Appeals
No. 880230- CA
:
:
#146

PLAINTIFF AND APPELLANT'S BRIEF

Appeal from the Judgment and Order of the 4th Judicial
District Court for Utah County,
Honorable Cullen Y. Christensen, Presiding.

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FILED

OCT 12 1988

COURT OF APPEALS

FILED

SEP 12 1988

COURT OF APPEALS

FILED

OCT 12 1988

STATEMENT OF JURISDICTION

Mary T. R.
Clerk of the
Utah Court

Jurisdiction in the Court of Appeals is conferred by virtue of Section 78-2a-3-(2)(h) and Rule 3 of the Rules of the Utah Court of Appeals.

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- v s -

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Defendant and Respondent.

:

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Court of Appeals
No. 880230- CA

PLAINTIFF AND APPELLANT'S BRIEF

STATEMENT OF ISSUES

The issues presented by the appeal are:

1. Is the evidence sufficient to support Findings of Fact 8, 12, 17, 20, 37, 38, 40 41, 42 and 49 made by the District Court.
2. Was the District Court's calculation of damages incorrect by fifty percent (50%) and therefore an error in law.

STATEMENT OF THE CASE

This is an action wherein Respondent, LEO FOLSOM, obtained a Judgment against Appellant, RODNEY JENSEN, in the sum of \$269,006.37 in addition to other relief.

FOLSOM and JENSEN each claimed that the other had drawn money from their motel business without properly accounting for said sums. Both agreed that they operated the business as a partnership. No

substantial books of account were kept by either of the parties. The motel, known as the Quality Inn of Provo, had been purchased in May 1980 by FOLSOM and JENSEN.

Randy Heaton, CPA, was appointed as interim receiver by the Court and compiled financial summaries of the partnership business from 1980 thru 1984. Bruce Wison, CPA, was appointed as receiver in July 1985 and continued in that capacity until July 1987.

FOLSOM claimed that JENSEN could not document \$269,006.37 in draws and should therefore pay him said sum. JENSEN claimed that the draw counts were essentially the same.

The District Court was gravely ill during this period. The accounting data was very complex. After considering the evidence, the Court granted Judgment against JENSEN in the sum of \$134,503.15 (Page 601 - Record on Appeal) in addition to other relief, in order to equalize the draw accounts of the parties. Later, on motion of FOLSOM, the Court doubled the Judgment to \$269,006.37, citing a computational error as the basis for said increase.

DISPOSITION IN THE LOWER COURT

Trial was held on September 29 and 30, 1986, and again on October 17, 1986, before the District Court, sitting without a jury. A memorandum decision was issued December 8, 1986, granting Judgment to FOLSOM against JENSEN in the sum of \$134,503.15 in addition to other relief. On January 2, 1987, FOLSOM filed a Motion to double the Judgment amount to \$269,006.37, citing a computational error.

On March 26, 1987, the District Court signed an order doubling the Judgment amount and signed Findings of Fact and Conclusions of Law and a Judgment.

On October 9, 1987, the Court signed an Order setting aside all documents executed on March 26, 1987, because of FOLSOM'S failure to provide copies of the proposed documents to opposing counsel prior to submitting the same for signature. The District Court set aside said documents pursuant to Rule 2.9 of the Rules of Practice of the District Court and reinstated said orders effective August 14, 1987.

JENSEN filed a Motion for a New Trial or to Amend the Findings of Fact and Conclusions of Law and Judgment which was denied on October 9, 1987.

RELIEF SOUGHT ON APPEAL

Appellants seek an order of this Court reversing the Judgment granted below and remanding the same for a Judgment consistent with the evidence and the law.

STATEMENT OF FACTS

1. In May 1980 Appellant, JENSEN, and Respondent, FOLSOM, pooled their resources to purchase the Quality Inn Motel in Provo, Utah, (Page 666 - Record on Appeal).
2. Both parties agree that they operated the business as a partnership (Page 667 - Record on Appeal).
3. No substantial books of account were kept by either party (Page 667 - Record on Appeal).

4. The down-payment for the motel was \$125,000.00 plus a finders fee of \$4,250.00 (Page 668 - Record on Appeal).

5. JENSEN contributed \$60,000.00 towards the down-payment in the form of two bags of silver (valued at \$15,000.00 each) and checks in the sum of \$30,150.00. (Plaintiff's Exhibit 13, 14, 16, 17 and Defendant's Exhibit 15), (Page 1180 Line 7-9 - Record on Appeal), (Page 1188 Line 9-12 - Record on Appeal), (Page 1183 Line 12-13 - Record on Appeal), (Page 1201 Line 15-25 - Record on Appeal).

6. FOLSOM contributed the balance of the down-payment in the form of silver, diamonds and cash in the total sum of \$69,100.00 (Page 1179 thru 1183, Line 6 - Record on Appeal).

7. JENSEN owed FOLSOM \$4,475 to equalize their contribution to the down-payment. (See Paragraph 5 and 6 above.)

8. FOLSOM drew funds from the partnership business in the sum of \$34,475.00 during the time he was managing the business (Page 670 Paragraph 12 - Record on Appeal).

9. On April 15, 1982, the partnership borrowed \$60,000.00 and FOLSOM took a lump sum draw of \$30,000.00 as his share, while JENSEN took periodic payments in small amounts of between \$1,000.00 and \$7,500.00 for the total sum of \$30,000.00 as his share (Page 1256 Line 24 thru Page 1257 Line 20 - Record on Appeal), (Page 872 Line 3-7 - Record on Appeal).

10. During the time FOLSOM managed the business, he took cash from the partnership revenues in the total sum of \$23,915.70 and paid \$3,300.00 to JENSEN leaving an amount not distributed to his partner of \$8,627.85 (Page 1140 Line 8-25 - Record on Appeal), (Page 1125 Line 4-15 - Record on Appeal), (Page 1226 Line 1-7 - Record on Appeal).

11. On September 30, 1983, JENSEN withdrew \$60,000.00 from a partnership bank account (Page 1334-1335 Line 23 - Record on Appeal).

12. On October 3, 1983, JENSEN deposited \$60,000.00 to a partnership bank account (Page 1377 Line 6-25 - Record on Appeal), (Page 1378 Line 1-4 - Record on Appeal).

13. On January 26, 1984, JENSEN, using a partnership check, paid to the IRS the sum of \$17,335.58. The check stated on its face that is was for 1980 and 1981 941 Withholding Taxes (Exhibit 26), (Page 1376 Line 1-16 - Record on Appeal), (Page 1336 Line 22 thru Page 1337 Line 7 - Record on Appeal).

14. In July 1985 JENSEN paid the sum of \$77,500.00 to the receiver from his personal account in California (Exhibit 45 and Exhibit 32), (Page 1096 Line 7-23 - Record on Appeal), (Page 1363 Line 7-25 - Record on Appeal), (Page 1364 Line 1-18 - Record on Appeal), (Page 1365 Line 22-24 - Record on Appeal), (Page 1338 Line 2-7 - Record on Appeal).

15. On December 28, 1984, JENSEN paid the sum of \$15,000.00 to Valley National Bank in California to wire transfer said sum to a partnership account in Utah (Page 1367 Line 3-16 - Record on Appeal).

16. A partnership account received a deposit of \$15,000.00 between December 5, 1984, and March 29, 1985 (Page 1439 Line 11-25 - Record on Appeal), (Page 1440 thru Page 1442 Line 6 - Record on Appeal).

17. The partnership draw account of FOLSOM totals \$145,864.22 (Page 679 - Record on Appeal plus the foregoing mathematical adjustments).

18. The partnership draw account of JENSEN totals \$155,004.87 (Page 684 - Record on Appeal plus the foregoing mathematical adjustments).

19. The net difference in the partnership draw accounts is \$9,140.65 leaving JENSEN owing FOLSOM one-half of said sum or \$4,570.33 (Page 678-679 and 683-684 - Record on Appeal plus the foregoing mathematical adjustments).

SUMMARY OF ARGUMENTS

Even by marshalling all of the evidence in support of the Trial Court's Findings of Fact, and viewing the evidence in a light most favorable to the trial court, the evidence does not support Findings of Fact 8, 12, 17, 20, 37, 38, 40, 41, 42 and 49. (Scharf V. BMG Corporation. 700 P. 2d 1068, 1070 (Utah 1985)).

The District Court's calculation of damages was incorrect by fifty percent (50%) and therefore an error in law.

ARGUMENT

I. THERE IS INSUFFICIENT EVIDENCE IN THE RECORD TO SUPPORT FINDING OF FACT #8, BUT RATHER, BOTH PARTIES TESTIFIED THAT JENSEN CONTRIBUTED TWO BAGS OF SILVER (VALUED AT \$15,000.00 EACH) TOWARDS THE DOWN-PAYMENT.

Finding of Fact #8 states:

That FOLSOM initially put up all of the \$125,000.00 down-payment in cash, silver and diamonds; that each of the parties in order to equalize their respective contributions, was thus responsible to contribute the sum of \$64,625.00.

This finding is just plain wrong. Both parties agreed and so testified that of the original five (5) bags of silver, three (3) were contributed by FOLSOM and two (2) by JENSEN.

FOLSOM testified as follows:

Q Three (3) of those bags of silver were yours and two of them were Mr. Jensen's?

A. I believe that is right, yes (Page 1180 Line 7-9 - Record on Appeal).

Q How much was to your credit?

A. Three (3) of those bags were mine, and two (2) of those bags were Rod's, so \$30,000.00 of the silver was mine--I'm sorry,

\$45,000.00 of the silver was mine, \$30,000.00 of the silver was Rod's (Page 1182 Line 8-12 - Record on Appeal).

A. Yes. The five (5) bags of silver that were reasonably paid to the Madsen's, I have paid three (3) and Rod had paid two (2), so he owed me for a half a bag of silver (Page 1183, Line 11-14 - Record on Appeal).

JENSEN testified as follows:

Q. Let me take you back to the time that you made the down-payment on the motel. Can you tell me, is Mr. Folsom's figure correct that \$125,000.00 was the down-payment?

A. That's correct.

Q. Can you tell me how much he paid and how much you paid?

A. Yes, each one of us paid \$62,500.00.

Q. Okay, can you tell me how that amount was paid by each party.

A. Well, initially we both put in two (2) bags of silver. I put in one check for \$15,000.00 and another check for \$5,000.00 and an additional check to John Olson which I don't know if that has been referred to yet, but John Olson was the finder for the corporation, and I paid a finder's fee for \$4,250.00 and that was considered part of the down-payment. So I paid

him \$4,250.00. Then, I gave Leo two or three miscellaneous checks, which I don't have the amount right here, to balance out what I owed him, the difference being \$54,250.00 and \$62,500.00 so there would have been approximately \$8,000.00 in additional checks balancing those accounts (Page 1201 Line 13 thru Page 1202 Line 8 - Record on Appeal).

Q. And it's your testimony that you each contributed two (2) bags of silver?

A. We did, initially, yes. Then Leo contributed an additional bag (Page 1202 Line 17-20 - Record on Appeal).

In addition to the two (2) bags of silver contributed by JENSEN and valued at a total of \$30,000.00 the District Court found that JENSEN had paid by various checks the sum of \$31,150.00 (Findings of Fact #9, Page 669 - Record on Appeal and Plaintiff's Exhibit 13, 14, 16, 17 and Defendant's Exhibit 15).

This evidence shows that paragraph 8 of the Findings of Fact should correctly state that JENSEN contributed a total of \$60,150.00 towards the down-payment, and FOLSOM \$69,100.00.

JENSEN would therefore owe FOLSOM one-half of the difference or \$4,475.00 to equalize their respective contributions to the down-payment.

II. THE EVIDENCE IS INSUFFICIENT TO SUPPORT FINDING OF FACT #12.

Finding of Fact #12 states:

That JENSEN authorized FOLSOM to and FOLSOM did in fact periodically repay himself out of funds of PERFORMANCE the sum of \$34,475.00 in checks and cash over the periods of time that FOLSOM was managing PERFORMANCE. That said sums were accounted for by interim receiver as a draw to FOLSOM.

In the record, FOLSOM testified extensively regarding various checks which were used for his personal benefit or that of his family (Page 1143 Line 7 thru Page 1174 Line 21 - Record on Appeal).

The District Court properly found that FOLSOM had drawn a total of \$34,475.00 from the partnership. However, JENSEN specifically denied authorizing said draws by FOLSOM.

JENSEN testified as follows:

Q Did you agree with him that he could repay himself with loans from the proceeds of the company?

A. No.

Q When did you first hear about that?

A. Well I heard about it when we first went to court, back in 1982 (Page 1203 Line 19-24 - Record on Appeal).

FOLSOM testified as follows:

Q When you made out these various checks to cash or to your wife or daughter, did you discuss those with Mr. Jensen before you did that?

A. Some of them I did. There had been no restraints made on me on disbursements of funds. I was to manage the motel, and I did. And the records would reveal why we wrote the check if you wanted. I did discuss the major transactions with him such as a trip to Nebraska, a trip to Wyoming, Christmas bonuses (Page 1174 Line 13-21 - Record on Appeal).

While it is true that FOLSOM drew \$34,475.00 from the partnership, the record does not contain sufficient evidence to establish that it was authorized by JENSEN and accordingly it should be charged to FOLSOM'S draw account.

III. THE EVIDENCE IS INSUFFICIENT TO SUPPORT FINDING OF FACT #17.

Finding of Fact #17 states:

That on or about April 15, 1982, the motel borrowed the sum of \$60,000.00; that each of the parties personally received the sum of \$30,000.00 from such loan; that the interim receiver charged the draw account of FOLSOM in the amount of \$30,000.00; that no corresponding amount was charged to the draw account of JENSEN by the interim receiver (Page 672 - Record on Appeal).

FOLSOM testified that the partnership borrowed \$60,000.00 and that he took \$30,000.00 and JENSEN was entitled to the other \$30,000.00 (Page 1276 Line 21-25 - Record on Appeal), (Page 1257 Line 1-3 - Record on Appeal).

No other testimony was given on this issue. However, JENSEN in his Affidavit stated that he withdrew his portion (\$30,000) in small

amounts of between \$1,000.00 and \$7,000.00 during the months following April 15, 1982 (Page 872 Line 3-7 - Record on Appeal).

The District Court erroneously found that because a lump sum withdrawal of \$30,000.00 to JENSEN did not appear in the financial summaries (Exhibits 1 and 2), that JENSEN should be charged for that amount.

The record shows, however, that JENSEN did take draws in small amounts of between \$1,000.00 and \$7,000.00 and that he did withdraw his \$30,000.00 in increments rather than a lump sum (See Exhibit 1 and 2).

Finding of Fact #17 should be modified accordingly and JENSEN'S draw account credited \$30,000.00.

IV. THE EVIDENCE IS INSUFFICIENT TO SUPPORT FINDING OF FACT #20.

Finding of Fact #20 states:

That during the period of time which FOLSOM managed the business, the interim receiver determined that the amount of cash withheld from receipts amounted to \$28,500.76; of such amount, it was undisputed testimony of FOLSOM that \$4,485.06 was used to pay miscellaneous expenses of the motel and that FOLSOM did not receive any of such money personally; it was the further testimony of FOLSOM that of the remaining balance, \$11,957.85 was taken personally by each of the parties; this was disputed by JENSEN who testified that he received only the sum of \$3,300.00 from such source; that the interim receiver charged the draw account of FOLSOM for the said \$4,585.06 and allocated an equal amount of \$11,957.85 to

the draw account of each of the parties (Page 673 - Record on Appeal).

The District Court found that of the unaccounted cash received during the time FOLSOM managed the business, \$4,585.06 was used for proper business expenses and the balance of \$23,915.70 was not (Page 672 Paragraph 20 - Record on Appeal).

FOLSOM testified that he thought that he had divided the money with JENSEN (Page 1140 Line 8-25 - Record on Appeal).

JENSEN, however, testified that he had received only \$3,300.00 (Page 225 Line 4-15 - Record on Appeal), (Page 1226 Line 1-7 - Record on Appeal).

The burden to show that one-half the cash had been paid to JENSEN was FOLSOM'S. The evidence in the record is not sufficient to establish that fact.

Finding of Fact #20 should provide that FOLSOM'S account should be charged \$8,627.85 representing one-half of the cash not distributed to JENSEN.

V. THE EVIDENCE IS INSUFFICIENT TO SUPPORT FINDING OF FACT #38.

Finding of Fact #38 states:

That on the 30th day of September, 1983, JENSEN issued check #1254 drawn on the account of Quality Management Associates (Account #33-10136-23) payable to First Security Bank of Utah as a cash check; that the record contains no credible evidence that the said sum of \$60,000.00 was ever returned to any of the motel accounts (See Exhibit 21); that the interim receiver did not show such sum on

JENSEN'S draw account (See Exhibit 2) (Page 679
- Record on Appeal).

JENSEN testified that he withdrew \$60,000.00 from a partnership account on September 30, 1983, and deposited the same amount in a partnership account four (4) days later on October 3, 1983 (Page 1376 Line 22 thru Page 1378 Line 4 - Record on Appeal).

FOLSOM never testified regarding this issue.

FOLSOM'S CPA testified that \$60,000.00 was withdrawn by JENSEN on September 30, 1983, and that a \$60,000.00 deposit was made four (4) days later on October 3, 1983. He did not claim that FOLSOM had deposited the money. FOLSOM did not claim he deposited the money (Page 1334 Line 1 thru Page 1335 Line 23).

The only evidence in the record was JENSEN'S testimony and the bank statements (Exhibit 27), that were consistent in showing that JENSEN both withdrew and redeposited the sum of \$60,000.00.

Finding of Fact #38 should state that JENSEN'S draw account should be credited with a deposit of \$60,000.00.

VI. THE EVIDENCE IS INSUFFICIENT TO SUPPORT FINDING OF FACT #40.

Finding of Fact #40 states:

That on January 26, 1984, JENSEN drew a check on the motel account for the sum of \$17,335.58 payable to INTERNAL REVENUE SERVICE; that there is not documentation to support JENSEN'S claim that such payment was for the motel account (See Exhibits 26 and 44) (Page 680 - Record on Appeal).

JENSEN testified that he paid the IRS on a partnership check dated January 26, 1984, the sum of \$17,335.58 for 1980 and 1981 941 Withholding Taxes. He produced the actual check (See Exhibit 26). He testified that it was paid in the State of Utah (He is personally a resident of California and had no other business in Utah except the motel partnership with FOLSOM). (Page 1376 Line 1-16 - Record on Appeal.)

FOLSOM did not testify on this issue.

FOLSOM'S CPA testified that the partnership check to the IRS was in the amount of \$17,335.58, that it was endorsed by the IRS, and that he had no information either way to establish what it was paid for (Page 1336 Line 7 thru Page 1337 Line 11 - Record on Appeal).

JENSEN'S testimony and the actual endorsed check established that it was paid for the stated purpose. Accordingly, it should be credited to JENSEN'S account.

VII. THE EVIDENCE IS INSUFFICIENT TO SUPPORT FINDING OF FACT #41.

Finding of Fact #41 states in part:

. . . That the permanent receiver received \$70,500.00 from JENSEN during July 1985 . . .
(Page 680, Paragraph 41 - Record on Appeal).

JENSEN testified that he deposited \$77,500.00 into a partnership account #133-26132-26 on July 3, 1985, (Page 1363 Line 18-25 - Record on Appeal). Exhibit 45 shows JENSEN'S withdrawal of \$77,520.00 from his California bank account on July 1, 1985, (Page 1210 Line 14 thru Page 1211 Line 4 - Record on Appeal). Exhibit 32 shows a

deposit of \$77,495.00 on July 3, 1985. At the time of JENSEN'S deposit, the accounts were maintained and controlled solely by the receiver.

FOLSOM did not testify on this issue.

Receiver Wyson testified that \$77,700.00 was deposited by JENSEN (Page 1096 Line 7 thru Page 1097 Line 15 - Record on Appeal).

FOLSOM'S CPA testified regarding a deposit of \$77,700.00 and FOLSOM'S attorney acknowledged and stipulated to it (Page 1338 Line 2-7 - Record on Appeal).

Accordingly, JENSEN should be credited with the deposit set forth in Exhibits 32 and 45.

VIII. THE EVIDENCE IS INSUFFICIENT TO SUPPORT FINDING OF FACT #42.

Finding of Fact #42 states in part:

. . . That there is no documentation to support a credit to JENSEN of \$15,000.00. . .

JENSEN testified that Exhibit #33 was a check dated December 28, 1984, for \$15,000.00 which he paid for a wire deposit into a partnership account (Page 1367 Line 3-16 - Record on Appeal).

Randy Heaton, the interim receiver, testified that the bank statements for account #33-86132-26 were complete except for the December 1984 statement. However, he testified that by reviewing the prior months and the subsequent months, it was clear that a \$15,000.00 deposit had been received. Furthermore, FOLSOM did not claim to have deposited said sum. Only JENSEN claimed to have deposited said sum. He also produced his check to Valley National

Bank which he used to accomplish the deposit (Page 1439 Line 11 thru Page 1442 Line 6 - Record on Appeal).

FOLSOM did not testify on this issue.

Accordingly, JENSEN should be credited with his \$15,000.00 deposit.

IX. THE EVIDENCE IS INSUFFICIENT TO SUPPORT FINDING OF FACT #37.

Finding of Fact #37 states in part:

. . . That the total draw account of FOLSOM is \$47,994.22 . . . (Page 679 - Record on Appeal).

Based upon the foregoing segments of appellant's argument, Finding of Fact #37 should state as follows:

FOLSOM'S DRAW ACCOUNT

1.	Add drawings per Exhibit 1	\$ 99,001.30
2.	Add Draw Account to Folsom	21,425.00
3.	Add acknowledged or un- explained check (See Par. 34 of Findings of Fact.)	1,063.03
4.	Deduct payroll and bonus reimbursements check #'s 1091 and 1130 (See Par. 18 and 19 of Findings of Fact.)	5,917.90
5.	Add cash from sales not deposited (See Par. 20 of Findings of Fact.)	8,627.85

6.	Deduct expenses improperly added by receiver (See Par. 20 of Findings of Fact.)	4,585.06
7.	Add deposit credits in error (See Par. 36 of Findings of Fact.)	14,250.00
8.	Add \$500.00 per month unauthorized salary (See Par. 15 of Findings of Fact.)	<u>12,000.00</u>
	TOTAL DRAWINGS	<u><u>\$145,864.22</u></u>

(Page 679 - Record on Appeal)

X THE EVIDENCE IS INSUFFICIENT TO SUPPORT FINDING OF FACT #49.

Based upon the foregoing segments of Appellant's argument, Finding of Fact #49 should state as follows:

JENSEN'S DRAW ACCOUNT

1.	Drawings per interim receiver schedule (See Exhibit 2).	\$125,571.87
2.	Add unauthorized payments not charged to JENSEN.	10,500.00
		8,941.00
		7,992.00
		<u>2,000.00</u>
	TOTAL DRAWINGS	<u><u>\$155,004.87</u></u>

(Page 684 - Record on Appeal)

XI. THE DISTRICT COURT'S CALCULATION OF DAMAGES WAS INCORRECT BY FIFTY PERCENT (50%) AND THEREFORE AN ERROR IN LAW.

The District Court essentially conducted a partnership accounting. Both FOLSOM and JENSEN agreed that their respective partnership draw accounts should be appropriately reconciled.

When the District Court made its memorandum decision, it used the correct accounting principle by determining each partner's draw account and then dividing the difference by one-half. Based upon the Court's original figures (which appellant believes were erroneous), the Court found JENSEN'S account \$269,006.37 greater than FOLSOM'S. To equalize the accounts, the Court required JENSEN to pay FOLSOM one-half of said sum or \$134,503.15 (Page 601 - Record on Appeal). In doing so, the Court treated both parties' draw accounts as accounts receivable of the partnership, to which each partner would be entitled to a one-half share.

However, FOLSOM persuaded the Court to double the sum needed to equalize the draw accounts in the sum of \$269,006.37. Using the Court's original calculation, this has the effect of increasing FOLSOM'S draw account from \$47,994.22 to \$317,000.59 and decreasing JENSEN'S draw account from \$317,000.59 to \$47,994.22.

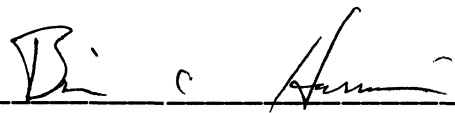
The correct calculation would be to require JENSEN to pay FOLSOM one-half of the difference in their draw accounts so that the accounts of the partners would be equal.

CONCLUSION

Appellant respectfully urges the Court to reverse the Judgment granted below under Rule 59 (a)(1)(5)(6)(7) Utah Rules of Civil Procedure, and remand the same for Findings of Fact, Conclusions of Law and Judgment consistent with the evidence and the law.

DATED this 30th day of September, 1988.

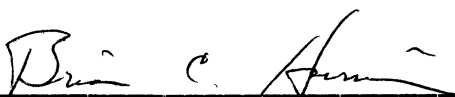
Respectfully submitted,



Brian C. Harrison
Attorney for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I hereby certify that I mailed four copies of the foregoing Brief to W. Jerry Ungricht, Suite 520, Salt Lake City, Utah 84111, postage prepaid, this 6 day October, 1988.



Brian C. Harrison

ADDENDUM

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
IN AND FOR UTAH COUNTY, STATE OF UTAH

PERFORMANCE INVESTMENT	:	
CORPORATION, et al,	:	FINDINGS OF FACT AND
	:	CONCLUSIONS OF LAW
Plaintiffs,	:	
	:	Civil No. 61506
VS.	:	
	:	(Judge Cullen Y. Christensen)
LEO F. FOLSOM, et al,	:	
	:	
Defendants.	:	
	:	

The above-entitled matter came on for trial before the Honorable Cullen Y. Christensen, District Court Judge, on September 29, 1986, the plaintiffs appearing in person and being represented by Brian Harrison and the defendants appearing in person and being represented by W. Jerry Ungricht and Stephen R. Randle. The Court having heard the testimony and having entertained the arguments of counsel, and being fully advised by evidence and argument, now finds and concludes as follows:

FINDINGS OF FACT

1. In May of 1980, plaintiff and defendant pooled their resources to purchase what was then the Quality Inn Motel, at

1300 South University Avenue, in Provo, Utah. They intended at the time to own the investment as a corporation by the name of Performance Investment Corporation (hereinafter referred to as "Performance" or as "the motel"). Accordingly, Articles of Incorporation were filed in Utah. Subsequently, however, the corporation was never organized and stock certificates were never issued. The only tax returns ever filed were Federal Partnership returns.

2. The parties have stipulated for purposes of this action that Performance may be considered a partnership in which the "capital accounts" of both plaintiff and defendant should be equal. No substantial books of account were ever kept in the course of Performance's business by either of the parties.

3. The parties have stipulated that the assets of Performance may be sold and, after payment of debts and obligations, divided equally between the plaintiff Rodney Jensen and the defendant Leo Folsom, subject to a judgment over against one or the other for the net difference in their respective drawing accounts as established by the Court based on the evidence herein.

4. As a result of the stipulations of the parties above mentioned, the corporation, Iris Jensen and Beatrice Folsom as named parties have no participation and should be dismissed. "Plaintiff" as used hereinafter refers exclusively to Rodney Jensen, and "defendant" refers exclusively to Leo Folsom. Folsom

is a resident of Roseburg, Oregon; and Jensen is a resident of Aptos, California.

5. The parties consummated their purchase and took over control of the motel on or about May 16, 1980; defendant Folsom thereupon assumed day-to-day management of the business and established three bank accounts in Provo, Utah, in the name of "Performance Corporation" on which both he and plaintiff were signatory. The principal operating account was No. 32-12816-7 at Zions National Bank.

6. That the total down payment required by the seller of the motel was \$125,000; that this amount was paid as follows: (1) Earnest money in the amount of \$5,000; (2) five bags of silver valued at \$15,000 each for a total of \$75,000; (3) five diamonds for which a credit of \$28,161 was given; and (4) another bag of silver with some gold coins added, paid sometime after the purchase, to pay the balance of \$15,839.

7. That a finder's fee of \$4,250 was paid to a John Olsen by Jensen as part of the costs of acquiring the motel; that the total up-front cost of this motel was thus \$129,250; that the remainder of the purchase price was paid by assuming various existing mortgages.

8. That Folsom initially put up all of the \$125,000 down payment in cash, silver and diamonds; that each of the parties,

in order to equalize their respective contributions, was thus responsible to contribute the sum of \$64,625.

9. That Jensen made repayments to Folsom toward equalizing the parties' accounts as evidenced by a series of four checks (Exhibits 13, 14, 16 and 17), totaling \$25,900 and made one check to John Olsen for \$4,250 (Defendants' Exhibit No. 15).

10. Jensen's check evidenced by Exhibit No. 13, dated June 18, 1980, although made payable to Leo Folsom in the amount of \$15,000 was deposited into the motel's bank account at Zions Bank in Provo, Utah, and was used for working capital for a short periods of time; that such check was shown as a credit to the "Loan or Draw" account of Jensen by the interim receiver before there were any drawings (Exhibit No. 2.); that a check No. 2322 in the amount of \$15,000 (Exhibit No. 46) was paid out of that same account approximately three weeks later payable to Jensen. Check No. 2322 was shown by the interim receiver as a debit to the drawing account of Jensen, thereby offsetting the earlier deposit and leaving a zero balance as of that date in the drawing account of Jensen. Folsom acknowledges that this check was endorsed over by Jensen to Folsom and was received by Folsom as partial repayment of amounts owed by Jensen to Folsom to balance the initial contributions between the parties upon acquisition of the motel; that Exhibit No. 13 and Exhibit No. 46 actually represent only one payment of \$15,000 by Jensen to Folsom for the purpose indicated above.

11. That the foregoing transactions between the parties produced the following results:

a. Plaintiff and defendant each respectively should have contributed one-half of \$129,250 or \$64,625 to the combined purchase price down payment and finder's fee.

b. Folsom provided the funds for the down payment and Jensen paid the finder's fee. Jensen, therefore, owed \$60,375 as his share of the acquisition costs to Folsom (\$64,625 - 4,250).

c. Jensen paid Folsom by separate checks the sum of \$25,900, leaving a balance owing to Folsom of \$34,475 (\$60,375 - 25,900).

12. That Jensen authorized Folsom to and Folsom did in fact periodically repay himself out of funds of Performance the sum of \$34,475 in checks and cash over the periods of time that Folsom was managing Performance; that said sums were accounted for by the interim receiver as a draw to Folsom.

13. Folsom managed the business until approximately April 12, 1982, at which time Jensen had completed a review of the motel's checking account records, and based on that review, Jensen accused Folsom of misappropriating funds of Performance, demanded that, he, Jensen be allowed to take over management of the motel, and Jensen thereupon took possession of the motel's bank accounts. Folsom acquiesced in Jensen's demands and turned

over to Jensen all of Performance's bank records in the possession of Folsom.

14. That during the approximate 24 months Folsom managed the business, Folsom paid out to himself various sums as draws for his personal account aggregating the sum of \$29,500 as more fully appears in Schedule "A" attached; when Folsom disbursed amounts to himself that he considered drawings, he made equivalent payments to Jensen that totaled \$31,500 (See Schedule "A" attached); that Folsom had frequent informal discussions with Jensen regarding the business; that Jensen had access to the accounting and bank records that were being kept by Folsom; that there has been no allegation made nor evidence received that Folsom ever commingled any funds of the motel with his own personal funds.

15. Folsom paid himself a salary of \$500 per month during the two years that he managed the business. Folsom initially discussed such payments with Jensen during the summer of 1981. The amount was a matter of the discussion at the outset, but no agreement was reached on the matter; Jensen did not thereafter raise any objection to the sum of \$500 per month, but there is no specific evidence that Jensen was aware that such sums were being paid to himself by Folsom at the time; such payments were not among the payments claimed to be improper in Jensen's Complaint; that the reasonableness of such compensation has not been established by the evidence.

16. The interim receiver charged these amounts to the "Loan or Draw" account of Folsom.

17. That on or about April 15, 1982, the motel borrowed the sum of \$60,000; that each of the parties personally received the sum of \$30,000 from such loan; that the interim receiver charged the "Draw" account of Folsom in the amount of \$30,000; that no corresponding amount was charged to the "Draw" account of Jensen by the interim receiver.

18. That on November 15, 1980, Folsom drew a business check (No. 1091) to his wife in the amount of \$3,038 and again on January 5, 1981, Folsom drew a business check (No. 1130) payable to his wife in the sum of \$2,879.90; defendant Folsom testified that said checks were to reimburse the payee for wage payments and employee Christmas bonuses previously paid for the benefit of the business and that the bonus payments to company employees were made in the presence of Jensen; that there is no testimony or evidence in the record to the contrary.

19. That the interim receiver accounted for the above two items by charging them to the "Draw" account of Folsom.

20. That during the period of time during which Folsom managed the business, the interim receiver determined that the amount of cash withheld from receipts amounted to \$28,500.76; of such amount it was undisputed testimony of Folsom that \$4,585.06 was used to pay miscellaneous expenses of the motel and that

Folsom did not receive any of such money personally; it was the further testimony of Folsom that of the remaining balance, \$11,957.85 was taken personally by each of the parties; this was disputed by Jensen who testified that he received only the sum of \$3,300 from such source; that the interim receiver charged the "Draw" account of Folsom for the said \$4,585.06 and allocated an equal amount of \$11,957.85 to the Draw account of each of the parties.

21. That Jensen had control and management of the subject business from on or about April 12, 1982, until the appointment of a permanent receiver on or about July 3, 1985; that during such period, Jensen made no payments to Folsom and Folsom had no access to funds or bank accounts of the business.

22. After taking over control of the motel, Jensen closed out the three (3) existing company bank accounts and subsequently established at least fifteen (15) separate bank accounts that the interim receiver was able to identify into which funds of the motel could be traced; that these accounts were located in various banks in Utah and California in the names of Performance Corporation, Performance Investment Corporation of Utah, Quality Management Associates, Quality Inn, Apple City Apartments, and in the personal names of Rodney and Iris Jensen; that Folsom had no signature authority on these accounts.

23. That Jensen established a practice of making a large number of interaccount transfers of funds among these various

accounts, using check deposits, wire transfers, and payments by cashier's check, including into and out of his personal accounts in Utah and California for the alleged purpose of "hiding it from the IRS"; that this practice also had the effect of hiding money from Folsom and making it especially difficult for the interim receiver to account for the funds of Performance.

24. That on or about December 23, 1982, the parties entered into a stipulation which was reduced to an order of this Court dated December 25, 1982, and filed on February 25, 1983, wherein it was ordered that:

a. Jensen not withdraw any of the funds of the company for his own purposes.

b. Jensen pay no company expenses, except for supplies and repairs, in excess of \$500, without approval of Folsom, and

c. Jensen must provide a full financial accounting since he took over the business, and from thenceforth a monthly accounting of all income and expenses, including copies of the daily reports and deposit receipts.

25. Jensen testified that he was present when the February 25, 1983, Order of the Court was entered, that he knew and understood the provisions of the Order, and that he agreed to the terms thereof.

26. No order of this Court, nor any agreement or stipulation of the parties, was entered modifying in any way the Court's Order of February 25, 1983.

27. From documents eventually obtained from Jensen by the interim receiver, and other bank records subpoenaed by Folsom directly from various banks, disbursements totaling \$349,822.63 between April 12, 1982 and July 3, 1985, have been identified representing funds that Jensen paid to himself or for his benefit, or funds for which no adequate accounting could be made as follows: (1) \$89,068 in wire transfers of funds from the motel's bank accounts to personal accounts of Jensen in California, all occurring after the Court's Order of February 25, 1983, (Exhibit No. page 1); (2) \$245,000 in cashier's checks payable to or cashed by Jensen, \$165,000 of which occurred after the Court's Order of February 25, 1983, (Exhibit No. page 2); (3) \$48,800 in motel funds paid directly to Jensen and deposited into personal bank accounts in California, \$3,300 of which occurred after the Court's Order of February 25, 1983, (Exhibit No. 18, page 3); (4) \$7,991.67 paid to Jensen's lawyers representing him in this case, \$4,359.38 of which occurred after the Court's Order of February 25, 1983, (Exhibit No. 18, page 4); (5) \$15,500 paid by Jensen to other related entities in which Jensen was an investing partner (Exhibit No. 18, page 5); (6) \$15,127.38 which includes sums paid either directly to Jensen or in payment of his American Express card, sums paid for a desk and VCR delivered to

his home, and for other smaller items (Exhibit No. 18, page 6); (7) \$12,000 paid to Iris Jensen (Exhibit No. 12 to Jensen's Deposition); and (8) \$17,335.58 paid to the Internal Revenue Service out of motel funds.

28. That none of the above disbursements by Jensen were approved by Folsom or were submitted to the Court for approval; that Jensen admitted comingling motel money with his personal funds in at least three personal accounts in California.

29. By reason of Jensen's failure to comply with orders of the Court, an interim receiver was appointed on February 27, 1984, and ordered to conduct a full audit of the motel. Jensen was allowed to maintain complete control and management of the business, but was ordered again to provide all the records to the receiver in accordance with the Court's February 25, 1983, Order. The Court also ruled that if the receiver's audit showed mismanagement by plaintiff, a permanent receiver would be appointed.

30. Plaintiff again failed to provide the ordered records to the interim receiver.

31. On December 7, 1984, the Court gave plaintiff until January 1, 1985, to provide all needed records or a permanent receiver would be ordered. Jensen again failed to fully comply and as a result, the Court appointed a permanent receiver and took control of the business from Jensen on July 3, 1985.

32. Both the interim receiver and the permanent receiver have taken what accounting information has been available to them and have compiled financial statements for Performance. The permanent receiver carried over the account balances determined by the interim receiver. Neither has audited any of the accounts of Performance that they have compiled, and neither has been able to express "an opinion or any other form of assurance on them". (Exhibit #10). Neither receiver was able to certify that all of the funds of Performance had been accounted for.

33. The interim receiver established an account for both Jensen (Exhibit No. 2) and Folsom (Exhibit No. 1) entitled "Loan or Draw", into which were entered various debit and credit amounts which will be considered hereafter. The permanent receiver renamed this account "Dividends".

34. The amount established by the interim receiver for the "Loan or Draw" account for Jensen was \$125,571.87. (Exhibit No. 2) which was determined by taking into account a deposit of \$77,500 which would have been received in the year 1985 which was beyond such receiver's accounting period. The amount established by the interim receiver for this account for Folsom was \$99,001.30. (Exhibit No. 1); that at the trial, checks No. 1338 dated June 8, 1981 in the amount of \$695.03, No. 1509 dated October 9, 1981 in the amount of \$248., and check No. 1980 in the amount of \$120.10, all drawn to Folsom or for his benefit were identified; that such checks were not charged to Folsom's "Draw"

account by the interim receiver (Exhibit No. 1); that Folsom either acknowledged such sums as being appropriate draws to his account or was unable to explain the purpose thereof.

35. Neither of these "Loan or Draw" balances is considered by either of the parties as an accurate accounting of the actual drawings by the Jensen and the Folsom for purposes of this action; but both parties were willing to use these figures as a starting point, proposing various adjustments upward and downward to arrive at the amount that each claims is the drawings of the other.

36. Folsom concedes that his "Draw" account (Exhibit No. 1) should be increased by the sum of \$14,500 inasmuch as the items of \$10,000 (1980 paid down to Madsen) and \$4,500 (1980 paid down to Olsen) were not actually deposits made by Folsom but were more accurately related to the down payment arrangements between the parties and were taken into account in connection with that transaction (See Paragraph 11 above).

37. From a preponderance of the evidence, the Court finds the actual chargeable drawings of defendant Leo Folsom from Performance to be as follows:

1. "Drawings" per Exhibit No. 1	\$99,001.30
2. Deduct Repayment of Down Payment Loan to Jensen Repaid From Motel Funds (Drawings of Jensen)(See paragraph 11 above)	-34,475.00

3. Add acknowledged or unexplained checks (See paragraph 34 above)	+ 1,063.03
4. Deduct Shared Loan Proceeds of 4/15/82 (See paragraph 17 above)	-30,000.00
5. Deduct Payroll and Bonus Reimbursements - Check Nos. 1091 and 1130 (See paragraphs 18 and 19 above)	- 5,917.90
6. Add "Cash From Sales not deposited (See paragraph 20 above)	+ 4,072.79
7. Add "Deposit" Credits in error (See paragraph 36 above)	<u>+14,250.00</u>
TOTAL DRAWINGS	\$47,994.22

38. That on the 30th day of September 1983, Jensen issued check No. 1254 drawn on the account of Quality Management Associates (Account No. 33-10136-23) payable to First Security Bank of Utah as a "cash check"; that the record contains no credible evidence that the said sum of \$60,000 was ever returned to any of the motel accounts (See Exhibit No. 21); that the interim receiver did not show such sum on Jensen's "Draw" account (Exhibit No. 2.).

39. That the Federal Tax Identification Number for the subject motel business is 87-0360668; that on June 30, 1984, Jensen paid by his personal check the sum of \$10,000 to IRS for said account; that on July 26, 1984, a Revenue officer of IRS acknowledged receipt of a check for \$10,000 (See Exhibits 34 and 35).

40. That on January 26, 1984, Jensen drew a check on the motel account for the sum of \$17,335.58 payable to Internal Revenue Service; that there is no record or documentation to support Jensen's claim that such payment was for the motel account (See Exhibits No. 26 and No. 44).

41. The parties stipulate that the permanent receiver obtained the sum of \$70,500 during or about the month of July 1985; that said funds were obtained by the receiver as a result of a wire transfer from Jensen's personal account (Apple City Apartments, Account No. 1301-00829, County Bank & Trust) in California through one of the motel savings accounts at the First Security Bank in Provo, Utah, maintained in the personal name of Jensen and his wife; that the accountant for Folsom was unable to determine whether such sum might have initially been included in the total of motel funds transferred into the various personal accounts of Jensen as indicated in Exhibit No. 18; that Jensen was unable to specifically identify the source of such funds; that the interim receiver on Exhibit No. 2 initially gave credit to Jensen's account for \$77,500 with reference to such transaction.

42. Exhibit No. 2 reflects a "Deposit" credit to Jensen on 12/28/84, in the sum of \$15,000. The interim receiver testified that he did not have a statement for December, 1984, showing deposits, but the next month's statements showed an increase in

the account of \$15,000, but the actual source of this \$15,000 was not established. Jensen testified that Exhibit No. 33, a check payable to Valley National Bank was actually used to purchase a cashier's check which was subsequently deposited in the Performance account. Based on Jensen's representation, Jensen was credited for the sum by the interim receiver. Exhibit No. 33 on its reverse, indicates that it was used by Jensen to purchase a \$15,000 cashier's check. There was no evidence presented that such a cashier's check was ever received by the motel. Folsom's accounting expert testified that no documentation exists in the records provided by Jensen that such cashier's check was received by the motel.

43. Check No. 1046 (Exhibit No. 24) is a check written by Jensen on the account of Performance dated 9/23/82 to Fresno Host, in the sum of \$10,500. It was not charged to his draw account.

44. Fresno Host was a motel in Fresno, California, in which Folsom, Jensen and others had invested. At a meeting in Fresno, California, in September, 1982, between Rod Jensen and other partners of Fresno Host (Folsom excluded) it was decided that because Folsom allegedly personally owed Fresno Host a sum of money, Jensen would pay that debt to Fresno out of Performance funds. Jensen then on 9/23/82, paid Fresno \$10,500 out of company funds. Jensen's only justification for that transfer, on

cross-exam, is that he felt it was a just debt that Folsom owed to Fresno.

45. Folsom testified that he did not owe Fresno the money. He stated that he took funds from Fresno Host to repay part of a loan from Performance to Fresno, and these funds were in fact deposited by him in Performance and credited to Performance as loan repayment.

46. At the time Jensen paid the money to Fresno, the California motel was in bankruptcy and still was indebted to Performance in excess of \$30,000; that Folsom did not concur in said payment to Fresno.

47. Check No. 1048, in the amount of \$5,000, dated 9/6/83, (Exhibit No. 24) was a check written by Jensen to Norma Smead relative to a project in Challis, Idaho. There is a conflict in the evidence as to the connection of the parties to such project; that such payment was made after the Court Order of February 25, 1983, and was made without Folsom's approval or authorization; the interim receiver did, however, charge said \$5,000 to Jensen's "Loan or Draw" account on Exhibit No. 2.

48. The sums drawn by Jensen to himself or for his benefit of \$8,941 for travel and miscellaneous expenses (Exhibit No. 24), \$7,992 for legal expense (Exhibit No. 23), and \$2,000 for Iris Jensen payments were not included as "draws" to Jensen in Exhibit No. 2 by the interim receiver (Exhibits No. 18 and No. 19). Folsom's Exhibit No. 19 adjusts those figures to reflect a charge

to Jensen, which is consistent with the evidence herein for the following reasons: (1) The same type of expenses on Exhibit No. 1, relating to Folsom were charged to his drawing account by the interim receiver; (2) At least \$10,849 of such checks were written by Jensen in violation of the Court's Order dated December 25, 1982, and all were unauthorized by Folsom.

49. From a preponderance of the evidence, the Court finds the drawings of plaintiff Jensen from Performance to be as follows:

(1) "Drawings" per Interim Receiver Schedule (Exhibit No. 2)	\$125,571.87
(2) Revised to show a deposit of only \$70,500 instead of \$77,500	+ <u>7,000.00</u>
CORRECT BALANCE	\$132,571.87
(3) Drawings to Repay Folsom Loan for Part of Down Payment	+34,475.00
(4) Disputed "deposits" credited to Jensen	
(a) Add check No. 1254 dated 9/30/83 FSB 33-101 36-23 to FSB (See paragraph 38 above)	+60,000.00
(b) 12/28/84 (Jensen check) (See paragraph 42 above)	+15,000.00
(5) All unauthorized payments not charged to Jensen:	
(a) 9/23/82 Check No. 1046 Fresno Host Payment (See paragraphs 45 and 46 above)	+10,500.00

(b) Travel and Misc. Expenses not on Exhibit No. 2 (See paragraph 48 above)	+ 8,941.00
(c) Legal Fees (See para- graph 48 above)	+ 7,992.00
(d) Iris Jensen payments not on Exhibit #2 (See para- graph 48 above)	+ 2,000.00
(e) Undocumented IRS Check (See paragraph 40 above)	<u>+17,335.58</u>
(6) Deduct unsupported charges for cash claimed to have been made by Folsom (See paragraph 20 above)	<u>- 8,657.85</u>
TOTAL DRAWINGS OF JENSEN	\$280,157.60

50. That a substantial part of the record of this case prior to trial consists of efforts on the part of Folsom to obtain information and an accounting from Jensen concerning Jensen's use and management of motel funds after Jensen assumed control. During the period of Jensen's control, Folsom filed eight Orders to Show Cause and Motions to Compel Discovery, all relating to the monthly income and expenses of the business.

51. On December 11, 1985, Folsom served a Request for Production of Documents, requesting the bank accounts, cancelled checks, check stubs, and deposit receipts from Jensen's personal bank account at Valley Bank, Watsonville, California, and a personal business account of the plaintiff Jensen from Valley Bank, Apple City Apartments, California, and all other cancelled

checks, deposit receipts and bank statements from Valley Bank accounts, account numbers unknown, from their opening to December 10, 1985. Request No. 17 of Folsom's Request for Production of Documents to Jensen requests "all cancelled checks, check stubs, deposit receipts and bank statements for any other account, not described above, to which monies from any Performance Investment Corporation account had been transferred, from the time such account was opened until the time such account was closed, or if still open, until December 10, 1985". Jensen responded that no other accounts were known as of that date.

52. A Motion to Compel further response filed by Folsom was heard on April 25, 1986, and the Court ordered Jensen to submit his response and documents to defendant Folsom on or before May 9, 1986. The Court reserved the issue of attorney's fees on the motion to the time of trial.

53. The record demonstrates that Jensen failed to fully comply with the said discovery requests and the Order of the Court with reference thereto. This is evident from Jensen's testimony at trial, where Jensen revealed the existence of at least two other personal accounts in California into which company monies had been transferred and which were not previously disclosed. In addition, Jensen provided records from another personal account that was known (Apple City Apartments), but for which Jensen had not provided the records previously.

54. During the trial on September 30, 1986, Jensen was ordered by the Court to produce within ten (10) days additional bank records which Jensen admitted having but which had not been previously produced. Jensen was also ordered to produce all of his American Express statements with a breakdown of the business versus personal expenditures itemized for the period in question.

55. No such records were produced within the time ordered. On the date of the continued-trial hearing on October 17, 1986, Jensen produced a portion of the ordered bank records and none of the American Express records.

56. Upon approval and Order of the Court, the following sums were paid to the interim receiver and permanent receiver for their services herein:

a.	Interim Receiver	
	Services: 5/1/85 to 11/30/85	\$ 4,042.33
	12/1/85 to 9/15/86	<u>5,960.38</u>
	TOTAL	\$10,002.71
b.	Permanent Receiver	
	Services: 7/3/85 to 11/30/85	\$13,312.18
	12/1/85 to 6/30/86	<u>13,528.04</u>
	TOTAL	\$26,840.22
	TOTAL RECEIVERS' FEES:	\$36,842.93

57. The receiver is still providing services and a final accounting has not, as yet, been rendered for the period of 6/30/86 to date of release.

CONCLUSIONS OF LAW

Based upon the foregoing the Court concludes as follows:

1. The "draw" account of the plaintiff, Jensen, (Exhibit No. 2) should be established at the sum of \$317,000.53 on the following basis:

(a) By reason of the fact that the plaintiff had control of the business from on or about April 12, 1982, to on or about July 3, 1985, it is his burden to prove and establish that his disbursement of funds was for the use and benefit of the business during that period. (In the Matter of the Estate of James Henry Harris, 4 6 Ut. Adv. Rep. 14)

(b) That plaintiff has failed to sustain such burden with respect to the additions to Exhibit No. 2 as outlined in the Findings of Fact, paragraph 49 (2), 4(a), 4(b), 5(b), 5(c), 5(d), and 5(e).

(c) That with respect to the payment to Fresno Host (paragraphs 45 and 46 above) the same was clearly made contrary to the Court Order dated December of 1982 and should be disallowed.

(d) That with respect to the claimed deposit of \$70,500 (See paragraph 41 above), the Court is of the opinion that the evidence and reasonable inferences to be drawn therefrom are sufficient to hold that such sum is not in addition to the amount of business funds collected by Jensen as established by

the receivers (See Exhibit No. 18) and that Jensen should therefore be given credit for such amount as a deposit. To hold otherwise .pa would, in the opinion of the Court, be based upon mere conjecture.

(e) That Jensen should be charged with the sum of \$34,475.00 in connection with the initial capital contribution of the parties in order to equalize the same, (See paragraphs 5-12 of Findings above), the actions of the interim receiver in charging such an amount to the "Draw" account of Folsom being in error and contrary to the agreement of the parties.

(f) That the sum of \$60,000.00 represented by check No. 1254 dated September 30, 1980, should be charged to the "Draw" account of Jensen, there being no credible evidence that Jensen ever returned such sum to the business account (See paragraph 38 of the Findings above).

(g) That the sum of \$15,000.00 should be charged to the "Draw" account of Jensen by reason of check dated 12/18/84 (Exhibit No. 33), there being no credible evidence that such sum was ever returned to the business account.

(h) That Jensen's "Draw" account should be reduced by the sum of \$8,657.85 which was charged to that account by the interim receiver as cash ostensibly paid to Jensen by Folsom from the business funds. The evidence does not preponderate in support of Folsom's claim that such money was actually paid.

Since Folsom had control of the business during the period such disbursements were claimed to have been made, the burden of proof was upon Folsom. Such burden has not been sustained in this particular.

(i) That Jensen's "Draw" account should be charged with the costs and expenses of the receivers in the further sum of \$36,842.92 as detailed in paragraph 2 following.

2. That the actions of Jensen while he was in charge of the business in comingling motel funds with those of himself and his wife, his extensive disbursement of funds without approval of Folsom or the Court, and his failure to provide meaningful accountings as ordered by the Court, were clearly contrary to and in contempt of the Court's Order dated December 25, 1982, and filed February 25, 1983; that the plaintiff Jensen should therefore be found in contempt of such order; that Jensen should be ordered to pay a fine as a consequence therefore in the sum of \$200 as provided in Section 78-32-11 UCA; that the necessity for the appointment of the interim receiver and the permanent receiver herein was directly attributable to the contempt above indicated and caused the expenses for such receivers which have been billed through the month of June 1986 in the aggregate amount of \$36,842.93 and for which additional expenses have been and will be incurred; that defendant Folsom has been aggrieved by such sums being paid from the motel funds and further aggrieved by reason of Jensen's said contempt in having to incur attorney fees incident to

efforts to obtain an appropriate accounting of funds from Jensen as Jensen was ordered by the Court to produce; that as a consequence thereof, and pursuant to the provisions of Section 78-32-11 UCA, Jensen should be required to assume the costs and expenses of said receivers, his "Draw" account should therefore be charged with the further sum of \$36,842.93 paid to date and Jensen should assume the unbilled and future expenses of the permanent receiver and he should hold the defendant Folsom harmless from any liability in connection therewith; that by reason of the foregoing the plaintiff Jensen should also be held liable to defendant Folsom for defendant Folsom's reasonable costs and attorney fees incurred in connection with this matter since December 25, 1982, the same to be established by appropriate affidavit served upon counsel for plaintiff pursuant to the requirements of Administrative Order No. 23 of this Court.

3. That the "Draw" account of defendant Folsom (Exhibit No. 1) should be established as the sum of \$47,994.22 on the following basis:

(a) Such account should be reduced by the sum of \$34,475.00 erroneously charged by the interim receiver to such account in connection with the equalization of the initial capital contributions of the parties as outlined in paragraph 11 of the Findings above.

(b) Said account should be charged with the sum of \$1,063.03 for acknowledged or unexplained checks drawn in favor of Folsom as detailed in Paragraph 34 of the Findings above.

(c) That the sum of \$30,000 as shared loan proceeds added to said account by the interim receiver but not charged to the Jensen "Draw" account in an equal amount should be deducted as detailed in paragraph 17 of the Findings above.

(d) The sum of \$5,917.90 should be deducted from said account to recognize business expenses paid by Folsom as detailed in paragraphs 18 and 19 of the Findings above.

(e) The sum of \$4,072.79 should be added to account for cash from sales not deposited as detailed in paragraph 20 of the Findings above.

(f) The sum of \$14,250.00 should be added to offset credits for deposits allowed in error by the receiver as detailed in paragraph 36 of the Findings above.

4. That by reason of the foregoing a decree should be entered to reflect the following:

(a) That the receiver forthwith place the company for sale, and pending its sale, manage and continue the business, collect and preserve all assets, ascertain the company creditors and debts, and administer such assets for the use and benefit of the creditors and the parties until said company is sold.

(b) That upon a sale, approved by the parties or the Court after hearing, the receiver pay all debts of the business,

including the costs of sale and unpaid receiver expenses (the latter to be chargeable to plaintiff Jensen's "Draw" account, and then any net equity remaining to be distributed between the parties as follows:

(i) To the defendant Folsom the sum of \$269,006.37 plus interest on \$232,164.00 thereof at the rate of ten percent (10%) per annum from July 3, 1985, to equalize the draw accounts of the parties (Exhibits No. 1 and No. 2) plus any amounts approved by the Court and paid to the receiver for services of the receiver rendered after July 1, 1986, and plus Folsom's attorney fees and costs incurred in this action from December 25, 1982.

(ii) Any amount of net equity remaining to be divided equally between Jensen and Folsom.

(iii) In the event the sale proceeds should be insufficient to equalize the drawing accounts as indicated in (i) above, then Folsom shall have judgment personally against Jensen for one-half of any such deficiency, plus Folsom's attorney's fees and costs incurred in this action from December 25, 1982.

5. Judgment against Jensen for a fine in the sum of \$200.00 for contempt of Court.

DATED this _____ day of March, 1987.

BY THE COURT:

Cullen Y. Christensen, Judge

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW, postage prepaid, this 2 day of April, 1987, to the following:

Brian Harrison
HARRISON & MILLER
290 West Center
Provo, Utah 84601

Randall Benson, Jr.
Suite 800
Kennecott Building
Salt Lake City, Utah 84137

Patty Tower

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FILED
DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
SALT LAKE COUNTY, UTAH

1987 MAR 26 PM 4:26

W. Jerry Ungricht, #3305
Stephen R. Randle, #2687
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Attorneys for Defendant
Suite 520 Boston Building
Salt Lake City, Utah 84111
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ALL AMOUNTS PAID

OK
JUDGE

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

IN AND FOR UTAH COUNTY, STATE OF UTAH

PERFORMANCE INVESTMENT CORPORATION, et al,	:	JUDGMENT AND DECREE
	:	
Plaintiffs,	:	
	:	
VS.	:	Civil No. 61506
	:	
LEO F. FOLSOM, et al,	:	(Judge Cullen Y. Christensen)
	:	
Defendants.	:	
	:	

The above-entitled matter came on for trial before the Honorable Cullen Y. Christensen, District Court Judge, on September 29, 1986, the plaintiffs appearing in person and being represented by Brian Harrison and the defendants appearing in person and being represented by W. Jerry Ungricht and Stephen R. Randle. The Court having heard the testimony and arguments of counsel, being fully advised by evidence and argument, and having entered its Findings of Fact and Conclusions of Law herein,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That the receiver establish as the drawing account balance of plaintiff Jensen in the books and records of account of Performance the sum of \$317,000.53, plus any amounts approved by the Court and paid to the receiver for services of the receiver rendered after July 1, 1986.

2. That the receiver establish as the drawing account balance of defendant Folsom in the books and records of account of Performance the sum of \$47,994.22.

3. That the receiver forthwith place the company for sale, and pending its sale, manage and continue the business, collect and preserve all assets, ascertain the company creditors and debts, and administer such assets for the use and benefit of the creditors and the parties until said company is sold.

4. That upon a sale, approved by the parties or the Court after hearing, the receiver pay all debts of the business, including the costs of sale and unpaid receiver expenses (the latter to be chargeable to plaintiff Jensen's "Draw" account) and then any net equity remaining to be distributed between the parties as follows:

(a) To the defendant Folsom the sum of \$269,006.37 plus interest on \$232,164.00 thereof at the rate of ten percent (10%) per annum from July 3, 1985, to equalize the draw accounts of the parties (Exhibits No. 1 and No. 2), plus a sum to equalize the drawings and capital accounts of the parties related to receiver fees approved and paid for services rendered after July

1, 1986, and plus Folsom's attorney fees and costs incurred in this action from December 25, 1982, as determined and allowed by the Court after notice and hearing.

(b) Any amount of net equity remaining to be divided equally between Jensen and Folsom.

(c) In the event the sale proceeds should be insufficient to equalize the drawing accounts as indicated in (a) above, then Folsom shall have judgment personally against Jensen for one-half of any such deficiency, plus Folsom's attorney's fees and costs incurred in this action after December 25, 1982, as determined and allowed by the Court after notice and hearing.

5. Judgment against Jensen for a fine in the sum of \$200.00 for contempt of Court.

DATED this 26 day of March, 1987.

BY THE COURT:


Cullen Y. Christensen, Judge

W. Jerry Ungricht, #3305
Stephen R. Randle, #2687
UNGRICHT, RANDLE & DEAMER
Attorneys for Defendant
Suite 520 Boston Building
Salt Lake City, Utah 84111
Telephone: (801) 531-0441

FILED
MAR 23 1987
MAR 23 PM 4:26
CLERK OF DISTRICT COURT
SALT LAKE COUNTY, UTAH

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
IN AND FOR UTAH COUNTY, STATE OF UTAH

PERFORMANCE INVESTMENT	:	
CORPORATION, et al,	:	ORDER
	:	
Plaintiffs,	:	
	:	
VS.	:	Civil No. 61506
	:	
LEO F. FOLSOM, et al,	:	(Judge Cullen Y. Christensen)
	:	
Defendants.	:	
	:	

Defendant's Motion to Correct Error in the Memorandum Decision, filed herein on January 2, 1987, came on for decision pursuant to Rule 2.8; the plaintiff and receiver having been given notice thereof and filing no responsive pleading or objection thereto.

The Court, having reviewed the file and the Memorandum of defendant, and upon being advised in the premises, hereby rules as follows:

Defendant's Motion is granted and the Court further orders that the Court's Memorandum Decision of December 8, 1986, is hereby amended to read as follows at page 25-26, paragraphs 4(b)(1) and 4(b)(3):

"4(b)(1). To the defendant Folsom the sum of \$269,006.37 plus interest on \$232,164 thereof at the rate of 10 percent (10%) per annum from July 3, 1985, to equalize the draw accounts of the parties (Exhibits No. 1 and No. 2) plus any amounts approved by the Court and paid to the receiver for services of the receiver rendered after July 1, 1986, and plus Folsom's attorney's fees and costs incurred in this action from December 25, 1982.

4(b)(3). In the event the sale proceeds should be insufficient to equalize the drawing accounts as indicated in (1) above, then Folsom shall have judgment personally against Jensen for one-half of such deficiency, plus Folsom's attorney's fees and costs incurred in this action from December 25, 1982. "

DATED this 26 day of March, 1987.

BY THE COURT:


Cullen Y. Christensen, Judge

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W. Jerry Ungricht, #3305
UNGRICHT, RANDLE & DEAMER
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FILED
1987 OCT -9 PM 1:27

IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH

PERFORMANCE INVESTMENTS
CORPORATION, ET AL,

Plaintiffs,

VS.

LEO F. FOLSOM and
BEATRICE F. FOLSOM,

Defendants.

:

:

ORDER

:

Civil No. CV-61506

:

:

The above-entitled matter came on for hearing before the Honorable Cullen Y. Christensen, District Court Judge, on August 14, 1987, on plaintiffs' Motion to Strike and Defendant's Motion to Sell Business. The plaintiff, Rod Jensen, was represented by his attorney, Brian Harrison, defendant Leo F. Folsom, was present in court and represented by his attorney, W. Jerry Ungricht, the receiver, Bruce Wisan, was present and represented by his attorney, Randall Benson. The court having heard the testimony and arguments of counsel, and being fully advised;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Due to non-compliance with Rule 2.9, the Findings of Fact and Conclusions of Law and Judgment entered by the Court in

this action on March 26, 1987, are set aside and stricken, and then immediately reinstated on this the 14th day of August, 1987.

2. All post-judgment motions of the plaintiffs are to be filed on or before August 24, 1987.

3. Any response to post-judgment motions are to be filed by defendants on or before September 4, 1987, with plaintiffs' response there to on or before September 9, 1987.

4. Hearing is scheduled on any such motions for September 11, 1987, at 3:30 p.m.

6. Defendants' Motion to Sell Business is denied on the basis of the Court's ruling above rendering defendants' Motion untimely.

DATED this 9 day of Oct ~~August~~, 1987.

BY THE COURT:

Cullen E. Christensen
District Court Judge